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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1607

HARRY R. HUGHES, SECRETARY OF TRANSPORTATION, STATE OF MARYLAND, ET AL.,

Appellants,

v.

ALEXANDRIA SCRAP CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPELLANTS' REPLY BRIEF

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General,
J. MICHAEL MCWILLIAMS,
Assistant Attorney General,
Counsel to the Maryland
Department of Transportation,
GLENN E. BUSHEL,
Assistant Attorney General,
P.O. Box 8755,
Baltimore-Washington
International Airport,
Maryland 21240,
Attorneys for Appellants.

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APPELLANTS' REPLY BRIEF

ARGUMENT

The Appellants submit this brief in reply to the Brief of Appellee filed by the Alexandria Scrap Corporation (Alexandria), in order to refute some of the more prominent misconceptions set forth in that document. What follows embellishes the Appellants' Brief, and reasserts, in light of the Appellee's Brief, four fundamental arguments. To wit, that Maryland Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §11-1002.2(f)(5), is constitutional, and:

I. Does not disturb the Commerce Clause because

A. the District Court incorrectly indulged Alexandria's irrelevant economic analysis as a

basis for determining the statute's effect upon interstate commerce and the Constitution; and,

B. the statute creates no impediment to the free flow of interstate commerce; and,

II. Does not work a violation of the Equal Protection Clause of the fourteenth amendment because

A. that provision is inapplicable to the case at bar; and,

B. assuming, *arguendo*, that the Clause were applicable, it would not be infringed, as the Maryland statute is a valid, rational manifestation of the State's police power.

I. *Commerce Clause*

A.

The Appellants have urged this Court that, as a matter of law, the Maryland statute which is the subject of this case does not offend the Commerce Clause, U.S. Const. Art. I, §8, cl. 3 (Appellants' Br. 16-24), asserting that the correct method of measuring the impact of a State statute on the Commerce Clause is to ascertain whether that statute places a substantial and undue burden on the totality of interstate commerce. In this case, one aspect, but only one aspect, of that measurement would be to ascertain the burden, if any, which the Maryland bounty scheme imposes upon Alexandria's interstate business. It was further advanced that the proper way to determine the statute's effect on this single aspect would be to compare Alexandria's pre-*program* predicament with its post-*amendment* situation. Appellants' Br. 22.

In its brief, Alexandria failed to address these crucial issues, and demonstrated only a superficial understanding of the Commerce Clause. Alexandria expended a good deal of energy to present a deluge of statistics and

projections in an attempt to show the dire effects which the 1974 amendment of Maryland's bounty statute had upon its financial position. Appellee's Br. 35-38. Even if these figures are in themselves accurate, they have no relevance with respect to the constitutionality *vel non* of the Maryland law.

By making comparisons between its bounty receipts at their height before the 1974 amendment, and their low point thereafter, Alexandria offers a series of large percentage declines in various aspects of its dealings. This approach suffers from multiple infirmities. By presenting figures representing bounty receipts during the program's salad days as a starting point, it inherently assumes that Alexandria was somehow constitutionally entitled to receive those payments, and that any curtailment of such payments would be constitutionally suspect, if not void. Certainly the Constitution does not guarantee any scrap processor anywhere the right to receive bounty payments for automobile hulks from State governments. Indeed, a casual reading of Alexandria's assertions could cause one to marvel at Alexandria's ability to remain financially solvent prior to the institution of Maryland's program! For example, Alexandria believes it "remarkable" that 37.7% of its entire production during the first six months of 1974 resulted from deliveries of vehicles by unlicensed suppliers (Appellee's Br. 18). This is anything but surprising when one realizes that Maryland does not license out-of-state auto wreckers. Because of its Virginia location it is only natural that Alexandria would deal with predominantly non-Maryland suppliers.

The Maryland law has not reduced the effectiveness of a means of transporting goods in interstate commerce. Even if, under a distorted, narrow view of the

case, it "burdens" a company which may engage in interstate trading. The statute does not burden interstate commerce. The effect of the law might be that the particular patterns of interstate dealing which Alexandria once utilized are no longer used, although the statute certainly poses no impediment to their employment. "This is because of the freely chosen geographical [location of Alexandria's processing facilities, and] not because of the requirements of [the Maryland law]. There is no impairment of the ultimate ability to transport in interstate commerce in the most efficient and economical manner possible," *Proctor & Gamble Co. v. City of Chicago,* 509 F.2d 69, 77 (7th Cir.), *cert. denied,* 95 S. Ct. 1980 (1975).

Alexandria's proffered analysis is meaningless because it completely ignores the pre-program business setting. Therefore, even by employing an inaccurate and improper model, Alexandria did not meet its burden of proof, and failed to demonstrate that Maryland's bounty program places a substantial, unconstitutional burden upon interstate commerce.

B.

Maryland's bounty program does not interfere unconstitutionally with the free movement of goods in interstate commerce. The possibility that the availability of a bounty on some abandoned hulks might affect some business decisions is only an incidental, tangential factor which does no violence to the Commerce Clause. Suppose that Virginia assesses a lower corporate tax than does Maryland.[1] Would Maryland corporations have a cognizable Commerce Clause claim

[1] This is a hypothetical example, although it might coincide with reality by happenstance, as no attempt has been made to determine the differences between the corporate tax structures of Maryland and Virginia.

against the Virginia tax law because Virginia allows its corporations to retain a greater portion of their annual earnings than its Maryland competitors are permitted to keep? Certainly if the Virginians were compelled to pay less tax they would have more money with which they could enter the interstate marketplace and outpurchase their Maryland competition. Just as certainly, such a situation, which exists throughout the United States, cannot be grounds for "relief" under the Commerce Clause. In the spirit of the case at bar, it is suggested that Maryland could preclude Alexandria's participation in the bounty program, by repealing the present law and enacting a scheme providing a tax credit for every properly processed hulk. Alexandria would be effectively deprived of any financial benefit because it does not pay any Maryland taxes. Such an arrangement would not be constitutionally infirm. The current direct bounty payments do not foster any illegal purpose, and there would be "no genuine nexus" between the tax credit and Congress's exclusive right to regulate interstate commerce. *Cf. Walz v. Tax Comm'n,* 397 U.S. 664, 675, 90 S. Ct. 1409, 1415 (1970).

Differences between the States have many tangential ramifications upon interstate commerce, are inherent in our federal system of government encompassing 50 sovereign States, and do not violate the Constitution. It is only when a State *prohibits* a form or facet of interstate commerce, by direct preclusion, or by placing such an exceptionally heavy burden thereon that an aspect of commerce cannot be conducted, that the Commerce Clause is abridged. *See* Appellants' Br. 18-21.

Most State activity which this Court has declared unconstitutional under the Commerce Clause has shared a common trait: it prohibited some aspect of

interstate commerce. Because these blockages where not alleviated by any corresponding State action, there existed an absolute impediment to some phase of commerce. Cases which fit this general description include, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 84 S. Ct. 378 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295 (1951); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 69 S. Ct. 657 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S. Ct. 497 (1935); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S. Ct. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16, 49 S. Ct. 6 (1928); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658 (1923); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948), this Court was confronted with a slightly different situation where a State regulatory scheme, although it stopped short of prohibiting commerce outright, imposed such an inordinately heavy burden on interstate commerce that its direct effect was to substantially burden interstate trading. Consequently, the scheme was struck down as inimical to the Commerce Clause. Maryland's law neither directly prohibits any form of interstate commerce, nor does it place an extraordinary burden upon the conduct of such commerce.

Maryland's bounty program is significantly different from the situations presented in the cases just referred to. It does not prohibit any interstate (or intrastate) business. Any effect it might have upon interstate commerce is merely incidental, and it imposes no substantial burden on such commerce. Unlike the cases cited above, even if Maryland's law caused a blockage of some minute aspect of commerce, this would be more than offset by the fact that it promotes interstate

commerce in scrap metal, when that industry is examined as a whole. *See* Appellants' Br. 21, 38.

The Maryland bounty law does not impede the free flow of interstate commerce. It does not impinge upon Alexandria's right to buy, sell, or ship scrap metal in interstate commerce. *See Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20, 31, 95 S. Ct. 260, 266 (1974); *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199, 45 S. Ct. 481, 485 (1925). Because it does not infringe upon Alexandria's privilege to engage in interstate commerce, Maryland's comprehensive regulation of scrap processors and wreckers does not work a violation of the Commerce Clause.

II. *Equal Protection Clause*

A.

The Appellants maintain that Alexandria is not entitled to the equal protection of Maryland's laws because it is not within Maryland's jurisdiction. U.S. Const. amend. XIV, §1. *See* Appellants' Br. 24-25. Alexandria seeks to avoid this bar to its equal protection claim by equating its Maryland scrap processor's license with registration as a foreign corporation doing business in Maryland and physical presence within Maryland. In each of the cases upon which Alexandria relies (Appellee's Br. 80), the corporations involved were registered to do business as foreign corporations in the State whose laws were being questioned, and were in fact physically present and doing business in that State. *See WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 89 S. Ct. 286 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 69 S. Ct. 1291 (1949); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 17 S. Ct. 179 (1926).

Alexandria's possession of a Maryland scrap processing license has no bearing upon whether Alexandria is within Maryland's jurisdiction for purposes of the Equal Protection Clause. By way of illustration, consider a doctor who, during the course of his career, has been licensed to practice medicine by several States. Although he may be licensed to practice in several jurisdictions, he is only "within those jurisdictions," in the fourteenth amendment sense, where he actually practices his profession.

The Appellants' assertion that Alexandria is not within Maryland for purposes of the fourteenth amendment rests upon a conglomeration of facts. Alexandria is a Virginia corporation,[2] maintains its scrap processing facilities in Alexandria, Virginia,[3] is not registered with the Maryland Department of Assessments and Taxation as a foreign corporation doing business in Maryland, does not, in fact, engage in any business in Maryland,[4] and pays no Maryland taxes. None of these factors are contradicted in Alexandria's brief. Whether or not any one of these factors standing alone would be enough to demand the conclusion, when this amalgam is considered, "it is safe to say" that Alexandria is not within Maryland for purposes of the fourteenth amendment. *See Blake v. McClung*, 172 U.S. 239, 261, 19 S. Ct. 165, 174 (1898); *see also Sully v. American Nat'l Bank*, 178 U.S. 289, 302-03, 20 S. Ct. 935, 940 (1900).

This result remains undisturbed in spite of the fact that Alexandria maintains a Silver Spring "office" which complies with Maryland's administrative regulations. Stipulation of Facts ¶8 (A. 58A). In fact this

[2] Stipulation of Facts ¶1 (A. 58A).

[3] Stipulation of Facts ¶4 (A. 58A).

[4] Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss 79 (R. 197).

"office" is nothing more than the private home of Alexandria's president, and has absolutely no connection with the Appellee as a corporate entity.

It is unfortunate that the District Court remarked in its opinion that Alexandria was "within reach of Maryland's 'long arm' statute," because it transacted "sufficient business in Maryland" to come within the ambit of Maryland Code (1974) §6-103(b)(1) of the Courts and Judicial Proceedings Article. *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 57 (D. Md. 1975) (AJS. 20a). Not only was this comment *obiter dictum* in the truest sense of that phrase, Black's Law Dictionary 1222 (rev. 4th ed. 1968), but the statement is inaccurate. That statute provides that "A court may exercise personal jurisdiction over a person, who directly or by an agent: (1) transacts any business or performs any character of work or service in the state." By its own admission, Alexandria does not conduct *any* business within Maryland. *See* Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss 79 (R. 197). Perhaps the District Court overlooked this item because the application of Maryland's "long arm" statute was not an issue in the case, and was not discussed at argument.

Even if Alexandria were subject to the personal jurisdiction of Maryland's courts this would not necessarily imply Alexandria's presence in Maryland for purposes of the fourteenth amendment. "Long arm" statutes speak of "jurisdiction" in a service of process sense. The "within its jurisdiction" language in the fourteenth amendment contemplates a geographic or territorial usage of "jurisdiction." This is the classic meaning of "jurisdiction," and was certainly the import ascribed to that word when the fourteenth amendment was ratified in 1868. *See Pennoyer v. Neff*, 95 U.S. 714

(1877), where references to service of process "jurisdiction" are repeatedly made in the traditional sense, connoting a territorial power basis of "jurisdiction." It was not until 1945 that "service of process jurisdiction" began to significantly diverge from the classic notion of "jurisdiction" as a result of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945). "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence *within the territorial jurisdiction of a court* was prerequisite to its rendition of a judgment personally binding him," *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, 66 S. Ct. at 158 (emphasis supplied). As the 1945 *International Shoe* opinion reports, citing the 1877 *Pennoyer v. Neff* decision, the historic meaning of "jurisdiction" encompassed the concept of physical presence within a geographic territory. Indeed, this was its very essence. It is this denotation which must be attributed to "within its jurisdiction" as that phrase is employed in the fourteenth amendment, which was proposed in 1866, and finally adopted in 1868.[5]

B.

The Maryland bounty scheme would also pass constitutional muster under the typical equal protection standards. *See* Appellants' Br. 25-33. Alexandria seeks to demonstrate, by what amounts to a substantive due process argument, that the law violates the Equal Protection Clause. In its brief Alexandria asserts that

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[5] *See* South Carolina v. United States, 199 U.S. 437, 448, 26 S. Ct. 110, 111 (1905), where Mr. Justice Brewer wrote for this Court:

> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.

the justifications advanced by the Appellants in support of the distinctions drawn in the Maryland law are "untenable," Appellee's Br. 85. The Appellants argue that by not allowing non-Maryland scrappers to receive bounty payments by acquiring autos by means of indemnity agreements at least four rational purposes are achieved (Appellants' Br. 29): 1. It tends to insure that bounty recipients are amenable to judicial process in Maryland; 2. It insures that the indemnity agreement is enforceable; 3. It tends to insure that bounty payments will only be made on autos abandoned in Maryland; and, 4. It tends to limit the amount of money which the State obligates itself to pay out of its limited resources to non-taxpayers.

Alexandria feigns particular outrage at the rationality of Maryland's interest in limiting the payment of bounties to vehicles abandoned in Maryland, and insuring the integrity of indemnity agreements. Appellee's Br. 85-86. Indemnity agreements are not always enforceable under the law of many States, as they can be deemed to violate public policy. *See generally* 42 C.J.S. *Indemnity* §7, at 573 (1944). This is important because their enforceability depends upon the law of the State where they are to be performed. *See, e.g., Gorsalitz v. Olin Mathieson Chem. Corp.,* 429 F.2d 1033, 1048 (5th Cir. 1970). Maryland has absolutely no control over the laws of her sister States, and therefore cannot be expected to accept non-Maryland indemnity agreements which might be void or voidable. Although Alexandria opines that the proposition is "wholly incomprehensible," Appellee's Br. 89, Maryland's refusal to accept these agreements makes eminent good sense, and cannot be deemed purely irrational.

Alexandria assails the reasonableness of wanting to confine the payment of bounties to cars abandoned in

Maryland by terming such a rationale "untenable" and "perfectly ridiculous," Appellee's Br. 85, 87. Yet within only a few pages of this obloquy, Alexandria's deductive prowess improves markedly. In response to the Appellants' suggestion that the relief Alexandria seeks lies with the Virginia legislature, Appellants' Br. 32-33, Alexandria retorts (Appellee's Br. 94 n.111): "There is no rational reason to expect that the Commonwealth of Virginia would have any proper interest whatsoever in setting up a bounty program to cover abandoned Maryland vehicles recovered in Maryland"![6] This is precisely the Appellants' point. Maryland has absolutely no interest in encouraging the removal of abandoned Virginia vehicles recovered in Virginia or the District of Columbia.

This is *not* an attempt to defend any illegal action by raising another State's failure to act as a defense. Such reasoning was rightfully rejected by this Court in *Missouri v. Canada,* 305 U.S. 337, 350, 59 S. Ct. 232, 236-37 (1938). Rather, it merely is a recognition of the fact that it is entirely reasonable and proper for a State to exercise its police power in an attempt to purge itself of unsightly autos. It is equally as constitutional for a State to decide, as Virginia apparently has, that such an exercise is unwarranted.

The justifications offered in support of the Maryland law are realistically sound. However, even if they were

[6] Although this statement is accurate, it is a spurious response to the Appellants' assertion that Alexandria should properly pursue relief with the Virginia legislature. The thrust of the suggestion obviously implies that Virginia could establish a program designed to rid herself of abandoned vehicles much in the same way that Maryland has. The Appellee recognized that this was the true meaning, Appellee's Br. 69, but later chose to conveniently ignore its earlier observation, Appellee's Br. 93-94.

only logical abstractions, that would satisfy the Equal Protection Clause. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *McGowan v. Maryland,* 336 U.S. 420, 426, 81 S. Ct. 1101, 1105 (1961); *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S. Ct. 1153, 1161 (1970).

The desperation felt by Alexandria in its attempt to buttress a feeble equal protection argument may be measured by the reliance placed upon *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison,* 301 U.S. 459, 57 S. Ct. 838 (1937). That case is readily distinguishable from that now under review because there the foreign corporation was physically present, through an agent, in the State whose statute was being challenged. However, what is most curious about *Hartford Steam Boiler* is the fact that in over 38 years since it was decided this Court has never discussed it. That 5-4 decision has only been cited twice by this Court, and then as one of a string of citations, *McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S. Ct. 283, 288 (1964); *Morey v. Doud,* 354 U.S. 457, 464, 77 S. Ct. 1344, 1349 (1957). Since its original issuance in 1937, it has never been recognized to support the kind of substantive due process argument for which Alexandria cites it five times. On the solitary occasion in the United States Reports where *Hartford Steam Boiler* is discussed, it was severely criticized, *Morey v. Doud, supra,* 354 U.S. at 473, 77 S. Ct. at 1354 (Frankfurter, J., dissenting). As a "derelict in the stream of law," *Hartford Steam Boiler* would appear, in the proper case, to be a candidate ripe for overruling, and share the fate that *Liggett Co. v. Baldridge,* 278 U.S. 105, 49 S. Ct. 57 (1928), suffered in *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 167, 94 S. Ct. 407, 414 (1973).

Alexandria also seeks to place great emphasis upon this Court's decision in *WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117, 89 S. Ct. 286 (1968). The discriminations present in that case were declared violative of the Equal Protection Clause for the same reasons that Alexandria's claim cannot succeed. In *WHYY* the Pennsylvania corporation complaining of unconstitutional treatment under New Jersey's tax laws was registered and qualified to do business in New Jersey, and was physically present and doing business in that State. As a result of its being within New Jersey's jurisdiction, it was entitled to the equal protection of New Jersey's laws. Alexandria is neither registered to do business in Maryland, nor is it actually present within the State's jurisdiction.

Throughout its brief Alexandria tries to create the mistaken impression that Maryland instituted its bounty program with the intent of filling the coffers of its in-state scrap processors so that they might force their non-Maryland competitors out of business. It must not be forgotten that the payment of bounties in certain instances is only one part of a comprehensive scheme that, for reasons of environmental health, was "designed to arrest the increasing accumulation of automobile hulks, and to promote their recycling," *Administrator v. Vogt,* 267 Md. 660, 675, 299 A.2d 1, 9 (1973); Appellants' Br. 4, 12-14. In pursuance of this goal, the Maryland Legislature promulgated a "carrot and stick" program.

The payment of bounties constitutes the "carrot" aspect of the scheme. The "stick" portions of the program, from which non-Marylanders are effectively immune, demonstrate the legitimacy of this approach. *See* Appellants' Br. 14, 31. That Maryland has established something distinct from a bare giveaway

program is readily apparent. The scrap processors license is not a ticket to untold wealth. Maryland scrap processors and auto wreckers *must* obtain licenses lest they incur criminal penalties, Maryland Code (1957, 1970 Repl. Vol.) Art. 66½, §§5-201, 5-210. Although non-Maryland scrappers *may* be licensed by virtue of Md. Agency Rules & Regs. §11.02.05.45, there exists no corresponding provision by which non-Maryland wreckers can be licensed. If Maryland's licensing of out-of-state scrap processors was meant primarily to promote interstate commerce, Appellee's Br. 54, then why do the Appellants refuse to license non-Maryland wreckers? The simple answer is that the program was intended to forward a legitimate State interest, and any effects that it might have upon interstate commerce, even if favorable, are only incidental.

Alexandria's protestations to the contrary notwithstanding (Appellee's Br. 54-55, 60), the Maryland law does not insulate Maryland scrap processors from outside competition. While the preamble to House Bill 782, Laws of 1974, ch. 465 (A. 15A), recites that its purpose is to protect certain scrap processors by authorizing them to file indemnity agreements, it manifestly does not import economic protection from the hazards of the marketplace. Upon the execution of an indemnity agreement, the person delivering an inoperable eight year old vehicle to a scrap processor indemnifies the scrapper from all claims which might be lodged against him upon his destruction of the vehicle. Appellants' Br. 7 n.12. This is the sort of "protection" which an indemnity agreement affords a scrap processor. As has been discussed previously, only "certain" scrap processors may obtain bounties through the execution of these agreements, because Maryland can only be confident that agreements to indemnify

Maryland based scrap processors will be judicially enforceable.[7]

The fact that a non-Maryland scrap processor is less likely than his Maryland counterpart to obtain hulks from licensed Maryland wreckers, and as a result collect fewer bounties, is just a business consideration which the non-Marylander must take into account before deciding to seek a Maryland scrap processors license. Unlike the *Toomer v. Witsell, supra,* situation, the token licensing fee is the same for all applicants regardless of location. The freedom to choose between seeking a Maryland license and not is a luxury which only non-Maryland scrap processors enjoy. Maryland scrappers are required to be licensed.

[7] Of course, this inherently presupposes the reasonable expectation that agreements to indemnify Maryland scrap processors will be performed in Maryland, and therefore be enforceable under Maryland law. *See* page 11 *supra.*

CONCLUSION

The Maryland regulatory scheme is rationally based and free from invidious discrimination. As a valid exercise of the police power it does not do violence to the Equal Protection Clause. Unlike some otherwise permissible measures enacted pursuant to a State's police power, *see, e.g., Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 79 S. Ct. 962 (1959); *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 71 S. Ct. 295 (1951); *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 65 S. Ct. 1515 (1945), Maryland's program does not impose an undue burden on interstate commerce.

For all of the reasons expressed above, and in the Brief for Appellants, the decision of the District Court must be reversed, and judgment entered for the Appellants.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General,
J. MICHAEL MCWILLIAMS,
Assistant Attorney General,
Counsel to the Maryland
Department of Transportation,
GLENN E. BUSHEL,
Assistant Attorney General,
P.O. Box 8755,
Baltimore-Washington
International Airport,
Maryland 21240,
Attorneys for Appellants.

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